



IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-863

BROWN & GREGG,

Petitioner,

versus

U. S. INDUSTRIES, INC., and
DIVERSACON INDUSTRIES, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

USI's brief in opposition fails to respond to petitioner Gregg's contention that the opinion and judgment of the district court below, as affirmed by the circuit court, improperly extended and applied a constitutional principle to preclude Gregg's recovery of the value of his property interest unconstitutionally seized by USI. USI completely sidesteps Gregg's contentions by arguing that Gregg has presented a spurious constitutional issue because the "real holding" of the district court was simply that Gregg was not entitled to any "damages" from USI in excess of the amount of funds ac-

tually received by USI under a theory of unjust enrichment. (Brief in opposition, pp. 3, 4.)

But USI's analysis of the supposed "real holding" of the courts below is patently inaccurate. Although the district court's opinion did discuss certain cases requiring allegations and proof of malice in order to recover damages for the deprivation of constitutional rights, the district court carefully and expressly avoided predicated its decision upon those cases. Concerning the application of the damage cases referred to, the district court expressly stated:

"It is unnecessary to pursue this general line of authority, however, for the rule appears to be nearly universal that where a plaintiff, even in a property seizure case, relies upon a statutory procedure which has not theretofore been declared unconstitutional and where the only claim of 'wrongfulness' of the plaintiff's attachment or other conduct in bringing the action is the unconstitutionality of that procedure, there can be no recovery of damages." [Emphasis added.]

(App. 19a.)

The district court thereafter held that petitioner Gregg was precluded from recovering the full value of his seized property from USI upon the principle, which it found to be applicable under both Delaware and federal law, that

"[A] plaintiff will not be held civilly liable for reliance upon a statutory procedure in a property seizure case, where that statute has not yet been declared unconstitutional."

(App. 20a.)

Thus, the question presented by petitioner Gregg, that is,

"[w]hether the first litigant who obtains a decision holding state sequestration or attachment procedures constitutionally deficient for lack of jurisdiction over the litigant's property interest seized may be deprived of restoration of the full value of his property interest unconstitutionally seized and sold prior to final judgment by application of the principle that such constitutional decisions shall have prospective effect only"

clearly arises upon the facts in this case and the application of the principles of law by the district court as affirmed by the circuit court below.

Attempting to support its misconception of the district court's "real holding," USI erroneously states that the district court examined the record to see if any factual basis for a cause of action for damages existed and made factual findings in USI's favor which precluded Gregg's claim for restitution (Brief in opposition, pp. 4, 5). However, the district court did not adjudicate

Gregg's right to relief based on a factual record; it dismissed Gregg's motion for restitution for failure to state any claim for which relief could be granted (App. 16a). The district court did not provide Gregg an opportunity to offer any evidence in support of his motion for restitution or to amend his motion. Thus, it is quite evident that the district court decided the case as a matter of law predicated on the incorrect application of a constitutional principle rather than on any factual determination.

The plain fact is that the courts below erroneously relied upon the opinion of the Supreme Court of Delaware in *Downs v. Jacobs*, 272 A.2d 706 (Del. 1970), and the decisions of the Third Circuit in *G. H. McShane Co., Inc. v. McFaulden*, 554 F.2d 111 (3d Cir.), cert. denied, 434 U.S. 857 (1977), and *Kacher v. Pittsburgh National Bank*, 545 F.2d 842 (3d Cir. 1976), to preclude Gregg's right to the return of the full value of his property interest unconstitutionally seized at the hands of USI, even though Gregg was the first litigant to obtain a court decision holding the Delaware sequestration procedure unconstitutional. Not one of those cases involved a party in Gregg's position, as none of those cases involved the first litigant to mount a successful constitutional attack on the statutory sequestration or attachment procedures involved. Under the holding of the district court, affirmed by the circuit court, Gregg, the first litigant to obtain a constitutional decision invalidating the Delaware sequestration procedure, has been prohibited from recovering the full value of the

property taken from him as the result of an unconstitutional procedure through the application of the principle that such constitutional decision shall have prospective effect only. Thus, for the reasons stated in the petition for certiorari, the decision of the courts below has improperly extended the rule announced in those three cases.

For the reasons set forth above and in Gregg's petition for certiorari, this Court should issue a writ of certiorari to review the judgment order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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